Choctaw Nation of Oklahoma

Historic Preservation

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Comments on WT Docket No. 17-79 and WT Docket No. 15-180

April 13, 2017

The Choctaw Nation of Oklahoma values its government-to-government relationship with the Federal Communications Commission. On a day-to-day basis, we honor this relationship by reviewing communications tower construction projects under the National Historic Preservation Act (NHPA). This is done through the Tower Construction Notification System (TCNS), created by the FCC, with the input of both Tribes and Industry. From our perspective, this is perhaps the most efficient system for consultation under NHPA in existence. It is working quite well.

Since 2014, the Choctaw Nation has reviewed 1,318 projects in our 9 state area of historic interest through the TCNS system. While each of these projects builds important infrastructure, they also have the potential for irreparably damaging the human remains, sacred sites, and historic properties of our ancestors. Far more than bones and stones, these sites are at the very core of the culture and identity of our more than 200,000 Tribal citizens. Last year, we reviewed a project through the TCNS system that would have adversely affected the Choctaw Academy historic site in Kentucky. This site is connected to our treaties with the United States government; it was the home and place of education for dozens of our Tribal leaders from the last century, and has been on the National Register of Historic Places since 1972. Despite all of this, the Choctaw Academy was overlooked by the archaeologists who conducted the historic properties survey for the tower. Choctaw Nation's involvement brought this issue to light. We worked with the FCC and applicant to change the project design in such a way that the tower could still be constructed, but with minimal impact to this significant historic site (See Letter from Gary D. Batton, Chief of the Choctaw Nation dated February 28, 2017).

General Comments on the FCC Need for, and Objectives of, the Proposed Rules

1) *FCC seeks comment on certain measures of clarifications to expedite State and local processing of wireless facility siting applications pursuant to 332 of the Communications Act including "deemed granted" remedy in cases of unreasonable delay.*

We agree that the FCC has the authority to adopt *irrebuttable presumptions* establishing as a matter of rule the maximum reasonable amount of time available to review a wireless application. Specific timelines are nothing new for tribes with THPO programs and SHPOs across the United States. The 36 CFR Part 800 regulations set out specific timelines (30 days) for reviews from SHPO/THPO and Tribes for projects involving undertakings. As a program alternative to Section 106, the FCC delegated authority to consultants working for industry to initiate consultations and discuss appropriate protocols concerning a Nationwide Programmatic Agreement (NPA). The FCC/ACHP/NCSHPO NPA also set specific timelines through the TCNS for responses which we have always tried to honor. Tribes, states and local

municipalities should adhere to these guidelines as set in the agreement as we believe this is a reasonable amount of time to respond to a project.

Moreover, a "deemed granted" remedy is reasonable when there is no response and every effort has been made to obtain one. In the Section 106 process if there is a "no response" after 30 days from SHPO, THPO or tribes then the project undertaking can move forward.

2) *Fresh look at rules and procedures implementing the National Environmental Policy Act and the National Historic Preservation Act. Comment on potential measures to improve or clarify the Commission's Section 106 process, including in the area of fees paid to Tribal Nations in connection with their participation in the process, cases involving lack of response by relevant parties including affected Tribal Nations, and batched processing.*

The process of trying to follow the NPAs, their amendments, and the nuances contained in the Section 106 and NEPA processes becomes problematic especially when tribes were not signatories to these agreements but are still a very integral part of fulfilling the conditions of the agreements.

As in most instances when something goes wrong with a federal process where tribes are involved, the Industry (see Sprint Corporation comments on WT Docket No. 16-421 from March 8, 2017) and oftentimes the agencies of the federal government points blame at the tribes and considers them to be "barriers." We find it shocking that the tribes continue to be considered a hindrance (see Verizon comments on WT Docket No. 16-421, footnote 76) and barrier to technological developments. We have consistently worked toward positive outcomes with the FCC, Tribes, and Industry to promote technological progress which is beneficial to all citizens of the United States. However, the fact remains that the federally-recognized tribal governments working within the TCNS were NOT signatories or parties to the Nationwide Programmatic Agreements and yet somehow continue to be the scapegoats when the agreement, its procedural interpretations, and its implementation go awry.

There have been numerous times when consultants or contractors working for the wireless communications industry either did not send tribes notifications at all as required or the 620/621 packets lacked the essential information needed to make any kind of assessment or determination. When this occurred, tribes would request additional information or request specific information that was lacking from the packet. Who is actually holding up the process and creating barriers?

A "reasonable and good faith effort" by the FCC for the identification and evaluation of historic properties was considered to be the use of the TCNS program. We believe that the NPA provided sufficient times for responses through the system. We also recommend that FCC, through consultation, establish clear timeframes for all small cell and DAS deployment and when "shot clocks" would actually start for respondents to these types of projects.

The National Historic Preservation Act and Section 106

The definition of *undertaking* at 36 CFR § 800.16(y) is very specific and has been the standard in the Section 106 process. Although the FCC–CIRC1704-03, page 11, states, *Similar to a "major Federal action," an "undertaking" includes, among other things, projects, activities, or programs that "reguire[s] a Federal permit, license, or approval[.]* An undertaking is defined specifically as: "[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a federal permit, license or approval." A "major Federal action" is not a part of the NHPA or Section 106 process and these types of distinctions specifically separate the NHPA from NEPA.

Although the wireless communications industry would argue that their actions do not fall within the category of an undertaking with the deployment of small cell towers and DAS, the definition of *undertaking* should not be diluted to the point that FCC has no approval authority over these actions. The very existence of the NPA, its numerous amendments, and the lengthy consultations with numerous parties over the past twenty years has shown this to be otherwise.

We ask FCC to continue to defend the regulations that protect historic properties under NEPA and the NHPA. The definition of *undertaking* is clear in the regulations and should not be changed. The WIA, CTIA, and Sprint Corporation asks for relief from fees for small cell deployment and DAS along with the leeway to bypass the National Historic Preservation Act (NHPA) by either changing or ignoring the definition of an *undertaking*; Sprint Corporation states in its comments from March 8, 2017, "In the last decade, Sprint has spent millions of dollars on environmental review fees and tribal historic consultation fees, and not in a single instance has Sprint recovered a determination that its antenna deployment would have a significant environmental impact under NEPA or that it would have an adverse effect on an Historic Property protected by the NHPA."

We believe that the above statement by Sprint Corporation showcases direct evidence the TCNS is actually working. The very reason that Sprint Corporation can make this statement is that the TCNS and the involvement of tribes actually work to protect historic properties! On many occasions tribes have responded to delegated contractors and consultants that towers would have an effect on a historic property of significance to them and helped the company find an appropriate location for the tower to be moved *without any effects to historic properties*. If this partnership did not exist, the wireless industry would have had numerous delays dealing with inadvertent discoveries and very costly archaeological and historic property mitigation efforts.

Obviously there is still a huge "urban-rural digital divide" (Fact Sheet: 2016 Broadband Progress Report Chairman's Draft from January 7, 2016). One reason for this is that Industry had rather deploy small cell towers and DAS in urban areas (with no fees or oversight) to increase their consumer bases and their bottom lines while Indian country and rural communities continue to wait their turn for digital access. Could another reason for this divide be that industry has figured out that many archeological

sites, traditional cultural properties, and significant historic properties to Tribal Nations are often located in rural areas and they simply don't want to deal with tribes?

The reality is that the tribes that are participating in the TCNS oftentimes have the least amount of wireless communications resources available to them to fully participate in the process.

Tribal Review Fees

Tribal Nations have a "special expertise" that other consultants, contractors, or the wireless industry does not possess. The 36 CFR Part 800.4(c)(1) regulations state:

> The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

There was a time in the past when paper copies of NEPA/Section 106 requests inundated tribal offices. There was no FCC oversight. Major companies simply demanded that the tribes check a box in a NEPA checklist stating that their project would have no effect on any sites of traditional religious or cultural significance to the tribe. The tribes were given a very brief window of opportunity to even respond (sometimes only a week) to a request. The companies provided no maps or locational information related to the project, no information regarding previous archeological surveys, no evidence of any environmental studies, and *no tribal fees were paid*. Thousands of cell towers were built during this time and it was only with numerous meetings between FCC and tribes that a USET Best Practices protocol began to be developed. Does WIA, CTIA, and Sprint remember these times?

Many tribal historic preservation offices at that time operated strictly on grant funds obtained through the National Park Service through Tribal Historic Preservation Grant funds, Historic Preservation Grant funds, or other federal funding resources. These grant programs had strict budgetary constraints on how the funding could be used with deadlines specified for reporting and completion. With the advent of, and the bombardment of NEPA requests related to the wireless industry that was inundating tribal historic preservation offices, many offices were forced to devote a large amount of their daily workloads to answer these NEPA checklist requests, thereby taking time away from important tribal projects with limited funding, specific deliverables, and reporting timelines. The industry sure didn't consider the costs (or timelines) involved in response times back then for tribes; computer, postage, ink, phone services, copier, or staff time to actually respond. What tribal review fees did at that time was allow tribal governments the basic office necessities needed to actually respond in a more efficient manner.

FCC and USET (and a small number of other tribes outside of USET) began consultation and a *USET Model Explanatory Cost Recovery Schedule* was developed. The October 28th 2004 resolution passed by USET specifically stated that the schedule was "proposed as a model for Federal

Communications Commission (FCC) applicants who seek to access the 'special expertise' of USET Tribes in assessing the historic property and environmental impact of proposed communication tower construction."

In sum, the FCC recognized and acknowledged that the tribes did have a "special expertise" and as such tribal fees began to be charged in the process. The USET "Cost Recovery Schedule" detailed specifically the TCNS review process which also included a "Review of Survey Materials" and "Site Visit." The *Note:* at the end of the Cost Recovery Schedule states specifically; "An applicant and a tribe that are involved in a large number of cell tower sitings are encouraged to work out a cost recovery schedule that reflects any economies of scale that may be achieved, potentially lowering overall costs to the applicant."

It is evident from the comments made by Sprint Corporation that a number of tribes have abused the intent of fee schedules and the TCNS process. However, it is also evident from Sprint's comments that counties, local governments and municipalities have milked exorbitant fees from the wireless industry that were unreasonable. We absolutely encourage fees that are "fair and reasonable" especially when it comes to using the TCNS. The Sprint Corporation, as evidenced by their comments directed at Tribes has made the egregious mistake of categorizing all tribes in the same manner. In this case, Sprint Corporation would have us believe that "one bad apple spoils the whole bunch" which simply is not the case. Perhaps their consultants and contractors could have better explained in detail that each tribal government is unique in how it operates; each tribe also *possesses a special expertise* related to its history (that a consultant or contractor doesn't have), and that each has a unique government-to-government relationship with the Federal government.

It is unclear whether or not the Sprint Corporation (just based on their comments) negotiated a cost fee or cost recovery schedule with tribes they discuss in their comments, however what is perfectly clear is that Sprint Corporation paid the tribes and are now complaining about the amount of the fees.

The industry doesn't like that some tribes request fees "up front" before responding to projects. Often, this is a case where tribal historic preservation offices have had a very difficult time being paid in a timely manner once they provided services by the consultants/contractors working for the industry.

Federally-recognized tribal governments have a unique relationship with the Federal government and possess nationhood status retaining the right to self-government. Each tribe has their own reasons and justifications for the fees they charge but these should have been worked out in advance with the industry. The Advisory Council on Historic Preservation's (ACHP) Memorandum dated July 6, 2001 on *Fees within the Section 106 Review Process* specifically had a section entitled "When payment is appropriate." Tribal historic preservation offices provide "special expertise" related to assessing the eligibility of historic properties that may possess religious and cultural significance. No other entity in the Section 106 process can provide this for the benefit of the federal agency.

We encourage and welcome open and honest consultation with FCC and industry regarding tribal fees. We believe that a good starting point for discussion should begin with cost fee structure proposed by USET over 13 years ago.

Batched Processing

Tribes were involved in consultation with the FCC when "batching" was first introduced by a number of railroad companies as a way of streamlining the process for the deployment of Positive Train Control (PTC) towers. At a meeting in Tulsa, Oklahoma on December 9th-13th, 2013, Tribes discussed a "consensus" list of points based on the available information regarding the upcoming Program Comment on PTCs from the ACHP. These points included:

- Use of the TCNS system
- Charge of customary administrative fee as set by each tribe
- Individual tribes may choose to charge "expedited fees" or not
- Some type of quota system based on the company size/scope, as well as numbers and locations (hence a "Beta system" suggested by the FCC to the railroads)
- Text box or other red flag that indicates "existing" vs. new construction, as well as type of pole/antenna (wayside pole vs. base tower, etc.)
- Need for points of contact information for each of the RR companies
- Deal with previous constructed towers first before submitting new ones

We would hope that FCC reaches out to the tribes and industry and will organize similar meetings between the two in regard to the deployment of small cell towers and DAS.

Tribes also had a number of comments regarding the ACHP's upcoming Program Comment at that time that are pertinent to this docket; of note:

- Environmental impacts have not been addressed as to the PTC mandate. Individual towers may not have much of an impact, but cumulatively there may be.
- The ACHP and the FCC have a responsibility to the Indian tribes regarding the wayside poles that have already been built and need to make a clear statement regarding these.
- Define what constitutes "disturbed" lands.
- The definition of tribal lands for the purposes of Section 106 is "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities." Tribal lands under this definition is not the only area of importance for tribes as the 36 CFR Part 800 regulations clearly state that Indian tribes may have concerns with properties of religious and cultural significance on or off tribal lands and specifically guides federal agencies to consider historic properties located on "ancestral, aboriginal, or ceded lands of Indian tribes" in the Section 106 process. *Of note, a number of the*

contractors representing the Railroad companies when producing maps of "tribal lands" had state recognized tribes listed on their maps with the federally recognized tribe for the area not even listed.

- The option for tribal monitors to be present for initial ground disturbing at select locations. These tribal monitors would be paid as contractors by the companies at these locations.

Perhaps FCC could use some of these above comments to help facilitate discussion regarding the small cell towers and DAS deployment? What tribes found out from this meeting is that the contractors doing the work for the industry basically knew very little about any of the tribes yet they were delegated the initial engagement with the tribes and providing clearance for environmental and historic properties clearance.

Area of Interest

The wireless communications industry argues that tribal areas of interest have grown because of the fees that are charged. Could it be that some tribes now have better access to digital and geospatial information and technologies that they did not previously have? The THPO programs are relatively new to the Section 106 process. As tribes developed programs, their areas of interest also developed. With the advent of geographic information systems, geopspatial technologies, mapping, and databases that could store and enormous amount of information, tribes also had opportunities to create maps for themselves with their areas of interest. With Internet and "smart" technologies access to information became much quicker. What would have taken months of research to find in some cases can now be downloaded in split seconds from an archive across the world. With information comes knowledge and this is no different for tribal governments developing their areas of interest.

The wireless communications industry needs to realize that tribal areas of interest are not something static and must include not only "tribal lands" but ancestral, aboriginal, and ceded lands. The diversity of the Areas of Interest will be as diverse as the tribes in the United States. In many cases broader areas of interests have nothing to do with the actions of the tribe but the past policies of the Federal government that isolated, corralled, and eventually moved tribes hundreds, if not thousands of miles away from their homelands.

A question as to whether or not a tribal Area of Interest should have a set of "standards" or "guidance" to follow should be left to the FCC; for example, many tribes in the U.S. have a "Trail of Tears" can or should a tribe charge a fee for the *whole state* where the trail occurs even though the tribe may have just been passing through this area? What if the trail is not known? Should or can a tribe claim the whole state as an area of interest even though they only passed through the state? There has been no guidance from any agencies regarding these questions.

We do believe that through consultation and discussion, overlapping Areas of Interest can be worked out where perhaps the number of tribes or fees paid within any one overlapping area may be reduced.

Comments on the possible additional exclusions from Section 106 review

Most THPOs and tribal preservation offices seek to streamline and provide better ways of doing business under the Section 106 process. Any time that we can exclude certain projects from review allows our offices and staff to work on projects of more pressing importance. We agree that in some cases that the DAS will have very little to no impact on historic properties, however, the small cell deployments within rights-of-way may have affects that the industry has not considered. We are willing to consult with all the parties related to these concerns.

Comments on "Twilight Towers"

The Twilight Towers should be an opportunity for all parties, FCC, ACHP, Industry and the tribes to work *cooperatively together* to find a reasonable solution to using these towers for collocations, if they are needed. There are many questions that we have regarding these towers. How are the Twilight Towers prioritized in importance? Are all of them actually needed? What Twilight Towers actually need an expedited review? What Twilight Towers are in areas that would be instrumental in protecting the safety and health of American citizens? The reviews and clearances of these towers would seem to take precedence over others. Would it be possible to deploy a small team of knowledgeable experts representing both Industry and tribes to visit these site locations and provide expedited clearances or recommendations for further review regarding any affects to historic properties and the environment? These Twilight Towers basically were constructed foreclosing the ACHP's opportunity to comment, and negating a "reasonable and good faith effort" to identify and evaluate historic properties. Any affects to historic properties still need to be addressed. What if a tower was placed in an archeological site or historic property of traditional religious and cultural significance? What are the remedies for mitigation? These are questions that most tribes have regarding the Twilight Towers. We believe that solutions can be worked out expeditiously but they have to involve the tribes.

In March 2001, the Commission, ACHP and NCSHPO signed an initial Programmatic Agreement that excluded most collocations of antennas on existing structures from routine historic preservation review. Key elements of the Commission action included:

• Describing standards for identifying historic properties that may be affected by an undertaking and assessing effects on those properties, including a streamlined process for identifying eligible properties not listed on the National Register that may incur visual effects;

• Prescribing procedures including enforceable deadlines for SHPO and Commission review;

• Providing forms designed to standardize filings to SHPOs;

• Outlining procedures for communicating with federally recognized Indian tribes and Native Hawaiian Organizations in order to ensure protection of historic properties to which tribes and Native Hawaiian Organizations attach religious or cultural significance; and

• Establishing categories of "undertakings" that are excluded from the Section 106 review process. These exclusions include: enhancements to existing towers; replacement and temporary towers; certain towers constructed on industrial and commercial properties or in utility corridor rights-of-way; and construction in areas designated by a SHPO.

Right of Ways

"The draft further states that it may be assumed that no archeological resources exist where all areas to be excavated will be located on ground that has been previously disturbed to a depth of two feet or six inches deeper than the general depth of the anticipated disturbance (excluding footings and similar limited areas), whichever is greater, and no archeological resources are recorded in public files of the SHPO/THPO or any potentially affected Indian tribe or NHO. In other words, if the ground to be excavated has been previously disturbed, the applicant must research the SHPO/THPO's and Tribe/NHO's files, and if no records of archeological resources are found, it may assume that no survey is necessary" (Emphasis added).

WIA, CTIA, and Sprint Corporation argue that a small cell pole stuck in the ground or right-of-way (or a parking lot) should simply be cleared because it is in a previously disturbed context. However, there are numerous examples across the United States of significant historic properties and cemeteries that have been encountered in what was considered to be previously disturbed contexts (African Burial Ground, now a National Monument in New York City, the Freedman's Cemetery in Dallas, Texas, the Dutch Lovelace Tavern foundation and a 18th century cistern in Lower Manhattan, to name only a few). These examples underscore that simply stating that there would be "no effect" to historic properties because the ground was previously disturbed does not necessarily make it so.

We also believe that the roles of the municipalities, states, state DOTs, and counties should be more clearly defined regarding rights-of-ways and the fees charged. However, many state transportation rights-of-ways (and utility rights-of-ways) were excluded from Section 106 and NEPA reviews in the past (for the sake of argument let's compare the Houston stadium highlighted by Sprint Corporation as having no need for clearance under the NHPA). What has occurred recently is that a large number of archeological sites, cemeteries, and significant historic properties have been encountered during highway expansions and widenings; delaying the construction projects and costing much more than what it would have originally cost to actually "clear" the project under NEPA and/or Section 106. These compliance efforts, if they had been carried out in the past, would have at the least given the state DOTs

the ability to reroute and avoid impacts to historic properties and thereby save money and unnecessary delays.

As general closing comments, we recommend that FCC encourage or create avenues for tribes to actually detail their work with the FCC and Industry. Presently there is really no available platform to showcase the good things that are being accomplished with FCC, Tribal, and Industry partnerships.

All of our relationships with Industry through their contractors have been positive. However, we would recommend that either FCC or an outside party act as a mediator when conflicts or disputes arise between tribes and the wireless industry.

We thank the FCC for the opportunity to make comments on these important dockets.

Sincerely,

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